IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

FRIDAY, THE 2ND FEBRUARY 2007 / 13TH MAGHA 1928

FAO.No. 143 of 2006()

AS.135/2002 of I ADDL.SUB COURT,TRIVANDRUM
OS.88/1982 of III ADDL.M.C.,TRIVANDRUM
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APPELLANT

RAVI, KORAVILAKATHU VEEDU,
MANATHITTA MURI, POONTHURA, MUTTATHARA VILLAGE,
THIRUVANANTHAPURAM.

BY ADV. SRI.V.SURESH
SRI.G.SUDHEER

RESPONDENTS:
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1. B.SULOCHANA, DAUGHTER OF BHAVANI,
TC 47/1603, SREEMULAM LOCK, MUTTATHARA MURI,
DO. VILLAGE, THIRUVANANTHAPURAM.

2. KALIYAMBI PEETHAMBARAN, PUTHUVAL
VEEDU, VETTUKAD, POONTHURA, MUTTATHARA,
THIRUVANANTHAPURAM.

3. RAGHAVAN PRABHAKARAN,
KORAVILAKATHU VEEDU, POONTHURA, DO. DO.

4. BHARGAVAN SADANANDAN, PUTHUVAL VEEDU,
POONTHURA, DO. DO.

5. NAGAMMA, WIFE OF VISWANATHAN,
KORAVILAKATHU VEEDU, DO. DO.

6. ANANTHASENAN, SON OF VISWANATHAN,
DO. DO.

7. LATHA, DO. DO.

R1 BY ADV. SRI.M.RAJASEKHARAN NAYAR
SMT.MANJUSHA MOHANDAS

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 02/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO.1622/2006 IN FAO.NO.143/2006

DISMISSED

2/2/2007 Sd/- P.R.RAMAN, JUDGE.

P.R.RAMAN,J.

F.A.O.NO.143 OF 2006

Dated this the 2nd day of February, 2007

JUDGMENT

This appeal is against the decree and judgment of the Appellate Court dated 21/1/2006 in A.S.No.135/2002. The lst defendant in the suit is the appellant. The suit O.S.No.88/82 was filed by the 1st plaintiff seeking declaration, injunction, recovery of possession and other reliefs. Briefly stated the plaint averments are as follows:

The plaint schedule property consists of 7 cents of land which was obtained by the plaintiffs as A schedule in partition deed No.925 dated 12/3/1980 and also the Thottupurampokku property obtained as Kuthakapattam in favour of the plaintiffs.

According to them, they were in possession and enjoyment of the same. The defendants' property is lying on the western side of the plaint schedule property. An extent of 22 cents of property and adjoining Thottupurampokku property lying on the northern side of the plaint schedule property and also the defendants' property is alleged to be in possession and enjoyment of the plaintiff. While so, the the defendants encroached into the plaint schedule property and taken 4 cents of property from the possession of the plaintiffs, besides taking 50 lorries of sand from the plaint schedule property. The plaintiffs tried to obstruct the defendants from their illegal acts. But the defendants are trying to continue their illegal acts and it is not possible to restrain them without the intervention of the court.

2. The defendants on the other hand contended that there is no Thottupurampokku property as mentioned in paragraph 1 of the plaint. The property lying on the western side of the plaint schedule is not the property of the defendants. The defendants have not encroached into the plaint schedule property as alleged. They did not take sand from the plaint schedule property. The plaintiff has no property on the eastern side of the defendants' property. According to the defendants, the lst defendant and one Vimala have obtained 13 cents of property in Sy.No.1126/4 and also adjoining puthuval land as per sale deed No.2551/75 as executed by one Velayudhan. Pursuant to the same, they were residing in the said property. While so, 4 cents of property and the puthuval included therein were sold to the 2nd defendant in the year 1978 and accordingly, the 2nd

defendant is residing in that property after constructing a building. Defendants 1 and 2 and Vimala are residing in the respective property in their possession and enjoyment and having well defined boundary on all sides. There is a public pathway on the eastern side of the defendants' property and the property of the Vimala. The eastern side of the pathway lies the property of one Kaliampi Peethambaran. There is a well defined boundary fencing to all sides of the property of the said Peethambaran.

3. PWs.1 to 5 were examined on the side of the plaintiff and Exts.A1 to A8 were marked. On the side of the defendants DWs.1 to 3 were examined and Exts.B1 to B9 were marked. Exts.C1 and C1(a) were also marked. The trial court, after trial, found that the plaintiff was not entitled for any relief and

the suit was dismissed, against which the plaintiff preferred an appeal as A.S.No.36/1992. The said appeal was disposed of by judgment dated 3rd January, 2002 by way of remand. During the pendency of the appeal the same Commissioner, who inspected the property, was appointed twice as a Commissioner to inspect the property. The Commissioner filed his report on 1.3.1993 stating that a basement was constructed in the 7 cents of property obtained by the lst plaintiff by virtue of a partition deed No.925 dated 12/3/1980. Subsequently the plaint was alleged to be amended as per order in I.A.No.1568/95. Additional written statement was also filed. The Appellate Court, after considering the matter, held among other things that the Commissioner, after visiting the property each time, filed his reports before that court on

1/3/1993 and 8/3/2001 which would show that the defendants encroached into the plaint schedule property and constructed a basement thereon. Though the plaint was amended, the plaintiff did not state anywhere in the plaint that the defendants had encroached into the plaint schedule property and constructed a basement therein. The Commission reports and plan dated 27/3/1989, which were marked as Exts.C1 and C1 (a)respectively did not show any encroachment into the property scheduled in the original plaint. But the subsequent report of the Commissioner would show that there is real encroachment by the defendants into the property scheduled in the amended plaint. But there was no evidence to show any encroachment by the defendants by constructing a basement in the plaint schedule property. The appellant also did not have a case in the amended plaint

that the defendants had constructed a basement in the plaint schedule property. The Appellate Court was not inclined to rely on the solitary piece of evidence of the report of the Commissioner. Though the appellant contended that the defendants have property at the southern side of the plaint schedule property, the Appellate Court held that it is not reasonable to conceive that the original plaint schedule property was mistakenly considered by the plaintiffs as a puramboke property. Therefore, the Appellate Court found that the plaint schedule shown in the original plaint is different from the schedule shown in the amended plaint. It was contended on behalf of the defendants that since the additional written statement was filed by the defendants consequent upon the amendment of the plaint, it is only just and proper to grant them an

opportunity to adduce evidence to substantiate their case. Since the plaintiff was not aware of the location the property, it was contended that the Commission report alone cannot be relied on to identify the property. Though there is an averment in the plaint that there is trespass by the defendants, the nature of trespass is however not specifically pleaded. Since the burden of proof is on the plaintiffs, they have to establish that they have approached the court with clean hands and they must convince the court that their rights are infringed or attempted to be infringed in such a way that they cannot enjoy that right without the aid of court. It was found that the plaintiffs have not stated in the plaint regarding the cause of action or regarding the construction of basement by the defendants. After the elaborate consideration of the

matter, the Appellate Court thought that the case shall be remanded back to the trial court for fresh decision in the matter and accordingly both sides were given opportunity to adduce further evidence and if the trial court thinks that any new issues to be raised, the trial court is free to raise such issues and dispose of the matter expeditiously.

4. Pursuant to the remand order the trial court by its judgment dated 31st August, 2002 dismissed the suit against which the 2nd plaintiff preferred an appeal as A.S.No.135/2002. The Appellate Court again remanded the case to the trial court by the impugned judgment under appeal. Aggrieved thereby the present appeal is filed.

5. According to the appellant/1st respondent, the only reason for remanding the case is based on a finding that Exts.A5 and A5

(a) report and plan of the Commissioner were set aside by the trial court and in spite of appointing a fresh Commissioner, the trial court could not dispose of the matter and for that purpose the matter is remanded.

6. The learned counsel appearing on behalf of the respondents would further submits that since the trial court found that Exts.A5 and A5 (a) Commission report and plan are not reliable, it virtually set aside the same. The Appellate Court entered a finding that the trial court went wrong in dismissing the suit as it was found that the Commissioner has not identified or located the plaint schedule property in a proper manner. It was held that a perusal of para 23 and 24 of the judgment of the lower court would show that the Commissioner and the Surveyor appointed by the trial court had acted against the direction of

the court and prepared Exts.A5 and A5(a) in a casual manner and those Commission report and plan ought to have been set aside by the lower court. But the same was not done even after a finding that the Commissioner and Surveyor did not identify or locate the plaint schedule property in a proper manner. The evidence adduced by both sides is not at all sufficient to arrive at a conclusion regarding the allegation levelled against each other in the absence of a proper commission report and a survey plan. It is on these reasoning that the suit was remanded after setting aside Exts.A4, A5 and A5(a). The Appellate Court erred in holding that Exts.A4, A5 and A5(a) reports and plan were submitted by the Commissioner appointed by the trial court. As a matter of fact, it was the Appellate Court while considering the appeal in the earlier occasion

that the Commissioner was appointed, who inspected the property twice and submitted his report. There was no appointment of any fresh Commissioner subsequent to the remand made by the Appellate Court earlier. The trial court was only considering the additional evidence adduced in the matter along with the commission report in arriving at its conclusion. The trial court did not set aside the report and plan but found that Exts.A5 and A5(a) report and plan cannot be relied upon in the light of the evidence of the plaintiff and the Appellate Court in such circumstances ought to have considered as to whether the finding of the trial court regarding the non-acceptance of the report and plan (Exts.A5 and A5(a) was correct or not, and consider the other evidence available on record and then decide whether a further commission report may be called for for

a proper disposal of the case. The Appellate Court failed to see that the matter has come up on the second round before it, that the suit was of the year 1982 and therefore remanding the matter again to the trial court will only delay the process of final adjudication of the matter. Further the Appellate Court itself had on the earlier occasion appointed the Commissioner, who submitted Exts.A5 and A5(a). If so, nothing prevented the Appellate Court from appointing the same Commissioner or a fresh Commissioner, if it thinks that Exts.A5 and A5(a) are not to be relied upon or for any reason they have to be set aside. In such circumstances, I find that the order of remand passed by the Appellate Court is not justified.

7. The learned counsel for the plaintiff/respondent however contended that the finding of the Appellate Court that there was

no pleading to support the case of the plaintiff is not correct and that the trial court ought to have looked into Ext.B4 and also the statements made in the written statement before arriving at a conclusion. In the view I am taking, it is not necessary for this Court to enter a finding on merits as this is only an appeal against the remand order.

8. In the facts and circumstances of the case and for the reasons stated above, the judgment of the Appellate Court is set aside and the matter is remanded to the Appellate Court for fresh consideration and to dispose of the same in accordance with law.

9. It is open to the Appellate Court, if it thinks that Exts.A5 and A5(a) are not reliable and other evidence in this case is insufficient, to appoint a fresh Commissioner or the same Commissioner and after hearing both

sides, to dispose of the matter finally. In that regard the Appellate Court will also consider the basic report and plan, Exts.C1 and C1(a). The Appellate Court shall finally dispose of the matter as expeditiously as possible, at any rate within a period of six months.

The parties shall appear before the Appellate Court on 07/03/2007.

Appeal is allowed by way of remand.

P.R.RAMAN,
Judge.

kcv.